#STATE OF VERMONT
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

COMMISSIONER,
VERMONT DEPARTMENT OF LABOR,
Complainant

v. Docket #RB959

MILTON BUILDING SUPPLY
Respondent

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE HEARING OFFICER

FINDINGS OF FACT

This matter came on for hearing at the offices of the VOSHA Review Board on Monday, November 10, 2014 after due notice to the parties. Appearing for the Department was Dirk Anderson, Esq. Mr. Danny DeGraff appeared on behalf of his company, Milton Building Supply.

Based on the evidence presented at the hearing, both documentary and testimonial, the following Findings of Fact are hereby made:

1. On April 15, 2014, the Vermont Department of Labor, VOSHA Division, officially cited Milton Building Supply for a number of supposed violations. Also, on September 8, 2014, the penalties were amended and mitigated to some extent.

2. On May 2, 2014, Milton Building Supply, per its Owner-President, Danny DeGraff, appropriately wrote back to the State, giving its "Notice of Contest."

3. In its Notice of Contest, the company stated as follows: "It is my contention that the OSHA Compliance Officer conducted an illegal search based on the false claim he made to have a valid employee complaint when in fact he had an improper complaint because the person who filed the complaint was not an employee at the time of the complaint (as he had been

terminated 47 days prior) and therefore did not have standing to file a complaint under OSHA's Complaint Handling Process and/or Field Operations Manual. (See letter of May 2, 2014, Notice of Contest.)

4. Also, Mr. DeGraff in his Notice of Contest stated the following:

> "It is my understanding that the scope of the inspection in the case of an employee complaint 'must be in an appropriate relationship to the violations alleged in the complaint' and it is my contention that the inspection conducted clearly when (sic) way beyond the scope of the alleged violations by conducting a wall-to-wall inspection."

Page 2, Notice of Contest, supra.

5. At the hearing, Larry Newton testified. He is a Senior Compliance Officer with VOSHA and has served in that capacity for six years.

6. Mr. Newton has had a good deal of training on safety matters, including former training in safety systems and hazardous waste.

7. On March 3, 2014, a complaint was made to the Department. Mr. Newton testified that he did not know where the complaint came from.

8. Mr. Newton went to the establishment in Milton for an inspection on March 5, 2014. He met a secretary and showed her his official identification card. At that point, the secretary left that particular officer and went to speak with Mr. DeGraff.

9. Mr. DeGraff asked Mr. Newton if he would come back at a later time. Mr. Newton informed the secretary that if they refused to allow him to inspect, he would, in all likelihood, come back with a warrant. Again, she went and communicated that message to Mr. DeGraff.

10. At some point, Mr. DeGraff did come out to greet Mr. Newton.

11. Subsequent to this meeting, the company was cooperative in allowing Mr.

Newton to do a "walk-through" of the plant itself. No one prohibited him from doing so once he started to inspect the company premises.

12. Mr. Newton then testified to the following potential violations:

A. Citation 1, Item 1A

> Pursuant to 29 CFR 1910.106(g)(9), each service station should be provided with at least one fire extinguisher having a minimum approved classification of 6B, C located so that an extinguisher will be within 75 feet of each pump, dispenser, underground fill pipe opening, and lubrication or service room.

In this matter, Mr. Newton was describing the diesel fuel storage tank, rear of the building in question. The fire extinguishers were exhibited in pictures identified as "Exhibit A-1" and "Exhibit A-2." The storage tank in question was shown in photos "A-3" and "A-4."

In this case, upon cross-examination, Mr. DeGraff did make a valid point. He argued that Mr. Newton had estimated that the fire extinguisher was outside 75 feet of the storage tank in question. Mr. Newton had conceded that he had not used a tape measure in coming up with this calculation.

In this particular violation, it is not possible for the Hearing Officer to conclude, in fact, the fire extinguisher was outside of 75 feet from the storage tank. No doubt, Mr. Newton is an experienced inspection officer. However, without testifying that he had, in fact, used a tape measure to establish that the fire extinguisher was outside of 75 feet from the storage tank, it cannot be concluded that a violation had occurred.

Therefore, this particular violation, "Citation 1" is hereby stricken. (Also referred to as Citation 1, Item 1A.)

B. Citation 1, Item 1(b)

> "Pursuant to 29 CFR 1910.106(g)(8), conspicuous and legible signs prohibiting smoking shall be posted within sight of the customer being served. The motors of all equipment being fueled shall be shut off during the fueling operation."

In this case, it seems clear that the employer did not provide a workplace free from recognized hazards when warning signs or placards prohibiting open flames and smoking in combustible liquid fueling areas were not present. Pursuant to the Amended Notice to the Company, there was a "0" adjusted penalty on that particular violation. However, the violation is hereby AFFIRMED.

C. Citation 1, Item 2

Mr. Newton then testified to the following potential violation: Citation 1, Item 2: 29 CFR 1910.178(1)(L)(i) states that "the employee shall ensure that each powered industrial truck operator is competent to operate a power industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (L)."

Mr. Newton stated that, during his inspection, he observed a forklift on the premises. He interviewed an employee named Victor. That employee stated that he does drive the forklift at the plant. However, he stated that he had not training regarding the driving of such forklift.

It is found that, due to the fact that the employee drove the forklift without sufficient training, a violation did occur and is AFFIRMED.

When one looks at Exhibit B-5, the penalty of $600.00 is set out. Under "Severity" it was "medium." Regarding "Probability" it was deemed "lesser." Because of the adjustment factors, the penalty was set at $600.00. This penalty amount is hereby AFFIRMED.

D. Citation 1, Item 3A

Pursuant to 29 CFR 1910. 215(a)(2), the safety guard shall cover the

spindle and nut, and flange projections. The safety guard shall be mounted so as to maintain proper alignment with the wheel, and the strength of the fasteners shall exceed the strength of the guard."

In this case, as testified to by Mr. Newton, the safety guards on the bench grinder did not cover the spindle and nut and flange projections. This was made clear by the introduction of pictures admitted as "A-6", "A-7" and A-9" By looking at these exhibits/pictures, it is clear that a violation did occur and is hereby AFFIRMED.

Pertaining to the penalty, again, the Severity, Probability and Gravity were reviewed along with adjustment factors. The penalty for the violation regarding safety guards, supra, as discussed, has been reviewed. The penalty of $600.00 is hereby AFFIRMED.

E. Citation 1,Item 3B

Pursuant to 29 CFR 1910.215(a)(4), on offhand grinding machines, workrests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Workrests shall be kept adjusted closely to the wheel with a maximum opening of 1/8" to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. The workrest shall be securely clamped after each adjustment. The adjustment shall not be made with the wheel in motion.

Pursuant to this alleged violation, it is clear, by looking at the pictures, supra, that the employer did not provide a workplace free from hazards when a workrest on an offhand grinding machine was not of rigid construction and was distorted. Also, it was not kept adjusted closely to the wheel. The violation is hereby AFFIRMED. No penalty was given regarding this violation per the amended notice on September 5, 2014.

F. Citation 1, Item 3C

29 CFR 1910.215(b)(9) deals with the subject of safety guards. Where the operator

stands in front of the opening, it shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel shall not be exceeded, and the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed 1/4".

After hearing the testimony of Mr. Newton, and viewing the photos, supra, as discussed, it is clear that the employer did not provide a workplace free from recognized hazards when the distance between the wheel periphery and the adjustable tongue exceeded 1/4".

Pursuant to the Amended Notice of the State (September 8, 2014), the penalty in this violation was deemed to be "0." The violation is hereby AFFIRMED.

G. Citation 1, Item 4

29 CFR 1910.303(b)(2) states that listed and labeled equipment shall be installed and used in accordance with any instructions included in the listing and labeling.

Pursuant to this violation, it has been shown that the employer did not provide a workplace free from recognized hazards when listed, labeled, or certified equipment was not used in accordance with instructions included in the listing, labeling, or certification. One example of such equipment was the cable used as a 220-volt extension cord for the compressor.

It was clearly shown that this violation had taken place. It is hereby AFFIRMED. Also, in analyzing the penalty calculations (Severity, Probability, Gravity) and the adjustment factors, the adjusted penalty proposed of $1,500.00 is hereby AFFIRMED.

H. Citation 1, Item 5

Pursuant to 29 CFR 1910.303(g)(2)(i), this dealt with the guarding of live parts. Live

parts of electrical equipment operating at 50 volts or more shall be guarded against accidental contact by use of approved cabinets or other forms of approved enclosures or by other means. In this case, the State alleged that the employer did not provide a workplace free from recognized hazards when live parts of electrical equipment operating at 50 volts or more were not guarded against accidental contact by employees.

Regarding this alleged violation, the State admitted Exhibit "8A-9" which was a view of the electrical equipment in question. Mr. Newton testified that the piece of equipment was not as heavy as it should have been. The cable was insufficient as an extension cord. This piece of equipment was not designed to be unprotected. Also, it was far lighter and less protective than it should have been when one looks at the purpose it was used for. The piece of equipment shown in the photo, supra, was meant for 110-voltage, not 220-voltage. It was shown persuasively by the State that the employer did not provide a workplace free from recognized hazards when live parts of electrical equipment operating at 50 volts and more were not guarded against accidental contact by the employees.

The violation is hereby AFFIRMED. Also, the proposed penalty (Severity, Probability, Gravity) and adjustment factors leading to the penalty of $750.00 are hereby AFFIRMED.

I. Citation 1, Item 6

29 CFR 1910.305(b)(3)(ll) it states that boxes shall be closed by suitable covers securely fastened in place. It was alleged by the State that the employer did not provide a workplace free from recognized hazards when energized electrical boxes were not closed by suitable covers securely fastened in place.

Pursuant to this alleged violation, photo "A-15" was presented at the hearing. That photo was exhibited as evidence. It clearly shows that the electrical box in question was not closed by

suitable covers securely fastened in place. The location of this particular box was in the south overhead door at the plant in question. The alleged violation is hereby AFFIRMED. Also, the proposed adjusted penalty (Severity, Probability, Gravity) and the adjustment factors considered leading to the proposed adjusted penalty of $600 is hereby AFFIRMED.

J. Citation 1, Item 7(a)

. Pursuant to 29 CFR 1910.305(g)(ll)(i) it states requirements regarding flexible cords. They may be used only in continuous lengths without splice or tap. Hard service cords and junior hard service cords No. 14 and larger may be repaired and spliced so that the splice retains the insulation, outer sheath properties and usage characteristics of a cord being spliced.

. In the matter at hand, the State alleged violations in that the employer did not provide a workplace free from recognized hazards when the flexible cords were damaged and did not retain the insulation outer sheath properties, or usable characteristics of a cord being spliced. In the matter at hand, photos "A-16," "A-17" and "A-18" were admitted into evidence. They showed, obviously, damaged cords which were potentially dangerous. Wires were cut and unrepaired. One of the more obvious violations was shown by picture "A-18" whereby the damaged wire was run outside in a locality where trucks would regularly run over them. The violation is hereby AFFIRMED. Also, the penalty with calculations (Severity, Probability, Gravity) and adjustment factors leading to the amount of $1,050.00 are hereby AFFIRMED.

K. Citation 1, Item 7(b)

Pursuant to 29 CFR 1910.305(g)(2)(iii), flexible cords and cables shall be connected to devices and fittings so that strain relief is provided that will prevent pull from being directly transmitted to joints and terminal screws.

This problem was discussed at the hearing regarding a workbench and lumber yard block

heaters along with a radio in the rear of the building. It was shown that the employer had flexible cords in three locations that were not connected to devices and fittings so that strain relief was provided. The violation is hereby AFFIRMED. The penalty was "0" and that is also AFFIRMED.

L. Citation 2, Item 1

Pursuant to 29 CFR 1910.22(d)(1), in every building or other structure the loads approved by the building officials shall be marked on plates of approved design which shall be supplied and securely affixed by the owner of the building in a conspicuous place in each space to which they relate. Such plates shall not be removed or defaced but, if lost, removed or defaced, shall be replaced by the owner or his agent.

This alleged violation was seen in the mezzanine storage locale at the warehouse in question.

It was shown that the employer did not provide a workplace free from recognized hazards when loads approved by the building official were not marked on plates and affixed in a conspicuous place in each space to which they relate. The alleged violation is hereby AFFIRMED. Also, it should be stated that the State gave a "0" penalty for this violation. That penalty is hereby AFFIRMED.

M. Citation 2, Item 2

Pursuant to 29 CFR 1910.23(c)(1), every open sided floor or platform four feet or more above adjacent floor or ground level shall be guarded by standard railing. The railing shall be on all open sides except where there is an entrance to a ramp, stairway or fixed ladder. The railing shall be provided with a toe board wherever beneath the open sides.

In the matter at hand, it was shown by the State that the employer did not provide a

workplace free from recognized hazards when employees working close to open sided floors or roofs four feet or more above adjacent floor or ground level were not protected from falling by a standard railing or equivalent. The violation is hereby AFFIRMED. Also, the State, pursuant to this violation, gave a "0" penalty. That penalty is hereby AFFIRMED.

N. Citation 2, Item 3

29 CFR 1910.157(c)(1) provides that the employer shall provide portable fire extinguishers and shall mount, locate, and identify them so that they are readily accessible to employees without subjecting the employees to possible injury.

Pursuant to this alleged violation, the State did show that the employer did not provide a workplace free from recognized hazards when portable fire extinguishers were not provided and readily accessible to employees. Also, there were no signs near such fire extinguishers. The state employee, Mr. Newton, testified that he looked for the fire extinguishers but could not find them. He wished to see them "at every exit."

It was obvious to the Hearing Officer that this violation had been proven. It is hereby AFFIRMED. Also, the State gave a "0" penalty regarding this violation. It is hereby AFFIRMED.

O. Citation 2, Item 4

29 CFR 1910.1200(e)(1) states that employees are required to develop, implement, and maintain at each workplace a written hazard communication program which describes how the criteria specified in Paragraphs "F", "G" and "H" of this section for labels and other forms of warning, material safety data sheets and employee information and training will be met. According to Mr. Newton, there was no hazard communication program. He discovered this after speaking with employees at the company.

The violation is hereby AFFIRMED. Also, the proposed adjusted penalty of "0" is hereby AFFIRMED.

P. Arguments of Employer

The representative of the company, Mr. DeGraff, alleged that the State had conducted an illegal search because the person who filed the complaint was not an employee at the time of the complaint (as he had been terminated 47 days prior) and therefore did not have standing to file a complaint.

The Hearing Officer sees no merit in this argument. According to the credible testimony of Les Burns, a VOSHA supervisor, a former employee of Milton Building Supply had made the complaint to the State. Therefore, it was legitimate for the Compliance Officer to follow through with the inspection which led to the aforementioned violations.

In addition, Mr. DeGraff argued that the inspection conducted went "way beyond the scope" of the alleged violations. Again, that argument is rejected. Once in the plant in question, the VOSHA inspector had the discretion to discover the violations which were noticed in these proceedings. He acted appropriately.

It is important to note that Chief Compliance Office Les Burns testified the alleged violations were of so-called "local emphasis" programs: fall protection and powered industrial trucks (forklift in this case). Certainly, on-site inspection is allowed and warranted in response to "a complaint about a company in an industry covered by OSHA's local or national emphasis programs or a hazard targeted by one of these programs." In fact, this quote comes from the respondent company's own admitted exhibit, M-1. Three of the items specified in the Complaint involve powered industrial trucks and two involve fall protection. Mr. Newton acted in accordance with Vermont law and, also, pursuant to OSHA guidelines, and in an appropriate

way.

As for the argument that an Insurance carrier had supposedly approved of the plant in some way or other at an earlier time, that may have been relevant for purposes of insurance but has no relevance pertaining to the review of this matter.

Dated at Montpelier, Vermont this 1st day of ~~November~~ December, 2014.

Alan S. Rome, Esq.
HEARING OFFICER